



Implementing the FLSA Overtime Changes

4 Key Areas to
Focus on Now

MAY 2016



Introduction

On May 18, 2016, the Department of Labor announced new overtime rules that affect millions of American workers. The new rules double the minimum salary requirement to \$913 a week (\$47,476 a year) for certain employees to qualify as exempt — or not entitled to overtime pay.

\$23,660/yr

CURRENT MINIMUM EXEMPT SALARY



\$47,476/yr

NEW MINIMUM EXEMPT SALARY



4.2 million

WORKERS AFFECTED

Note: This guide is the second of two booklets we've developed on the FLSA Overtime changes. For more information on identifying which exempt employees could be affected; calculating hours worked by these employees; and considering appropriate compensation strategies, please visit or subscribe to the HR Support Center to see Part 1, the [FLSA Overtime Changes Planning Booklet](#).

4 Key Areas to Focus on Now

In this guide, we'll focus on best practices to implement and communicate these changes in your organization.

01

Reviewing company policies and practices

02

Internal communication

03

Employee training and compliance

04

Revising company budgets and processes

Additional Resources

This booklet also contains the following tools you can use to communicate some of the FLSA changes to your employees:

- » Fact Sheet
- » Sample FLSA Reclassification letter to employees
- » Time tracking memo to employees
- » FAQ

STEP 01

REVISING COMPANY POLICIES AND PRACTICES

The new overtime rules may mean many of your organization's employees will need to be reclassified, so we recommend first reviewing your current policies and procedures.

This is especially important if your organization doesn't currently have many non-exempt employees. If so, you may not have policies that deal with timekeeping and work hours.

If these policies and practices aren't currently covered in your employee handbook, we recommend adding them now, or distributing them separately as handbook amendments.

Once distributed, employees should sign-off to acknowledge their understanding and acceptance of the new policies.

THE WAGE AND HOUR GOLDEN RULE

Non-exempt employees must be paid for all time they are "suffered or permitted" to work. This doesn't just mean time in the office, but all time, whether approved by the employer or not.



STEP 01

REVISING COMPANY POLICIES AND PRACTICES

Changing the habits of your formerly exempt employees with regards to timekeeping is critical to prevent a wage and hour violation.

These employees are likely used to working after hours – responding to work email, finishing up projects, or engaging in other work tasks. While intentionally working

off-the-clock may not be your employees' goal, you want to be sure that your policies are clear around off-the-clock work and the company's commitment to recording all time worked by non-exempt employees.

KEY POLICIES TO REVISIT

- » Timekeeping
- » Off-the-Clock Work (like checking email after hours)
- » Bring Your Own Device (e.g., personal cell phone)
- » Meals and Rest Periods
- » State and Local Overtime
- » Travel Time
- » Payroll Changes

STEP 01

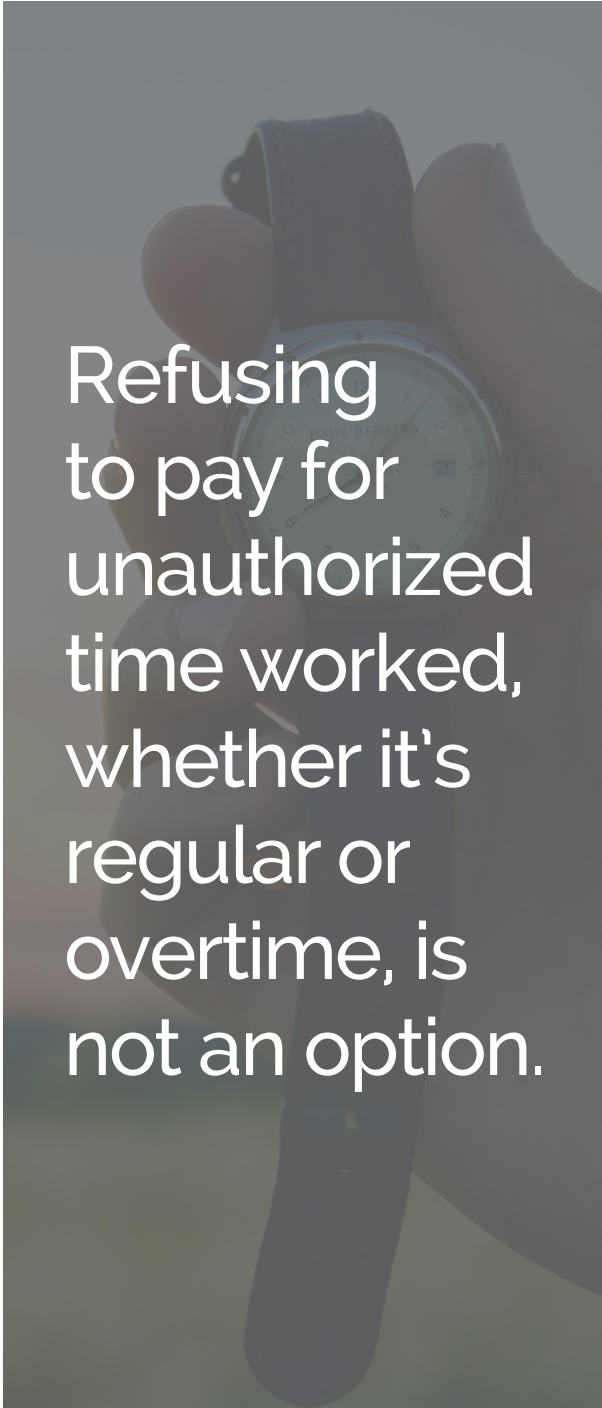
REVISING COMPANY POLICIES AND PRACTICES

TIMEKEEPING

Be sure to train your previously exempt employees who may not be familiar with your timekeeping procedures, e.g., tracking time, clocking in and out, compensating for off-duty work, turning in time sheets, etc.

OFF-THE-CLOCK WORK

All hours worked by a non-exempt employee must be recorded and compensated, even those worked outside of the employee's standard shift. Therefore, it's critical to have a policy in place that informs employees that all time worked must be tracked, and that off-the-clock work is prohibited by the company. In other words, employees must follow their written work schedule and may be disciplined for not doing so. Refusing to pay for unauthorized time worked — whether it's regular or overtime — is not an option.



Refusing to pay for unauthorized time worked, whether it's regular or overtime, is not an option.

STEP 01

REVISING COMPANY POLICIES AND PRACTICES

BRING YOUR OWN DEVICES

If a non-exempt employee checks their work email on their personal device (e.g. smart phone, tablet, or home computer), time spent working on this device is considered time worked, and should be tracked and paid accordingly.

For this reason, many employers don't allow non-exempt employees to use their personal devices for work purposes, or only allow such use with management approval. Additionally, a good Bring Your Own Device policy will require that employees accessing company information from their device have security measures in place to protect the company's confidential information.

MEALS AND REST PERIODS

Many states require meal and/or break periods for non-exempt employees, which vary depending

on the length of their shift, and many companies choose to provide meal and break periods voluntarily. It's important to inform employees of these breaks and your timekeeping procedures, and to notify them that no work should be performed during such breaks.

A good Bring Your Own Device policy will require that employees accessing company information from their device have security measures in place to protect the company's confidential information.

STEP 01

REVISING COMPANY POLICIES AND PRACTICES

STATE AND LOCAL OVERTIME POLICIES

Now is the time to ensure that you're familiar with your state and local overtime laws.

Although most employers will only be subject to the federal requirement to pay time and a half for hours worked over 40 in one workweek, Alaska, California, Colorado, and Nevada each have daily overtime provisions, and Massachusetts and Rhode Island require some employers to pay a premium for work on Sundays. It's important that employees and managers alike are aware of the rules for compliance.

TRAVEL TIME

Since non-exempt employees must be paid for all time worked, travel time for those who regularly travel for work may require further consideration.

There are a few narrow exceptions when travel time isn't payable (e.g., when the employee is a passenger in a vehicle or during a standard morning/evening commute), but it's a good practice to assess an employee's travel schedule to ensure proper pay.

STEP 01

REVISING COMPANY POLICIES AND PRACTICES

PAYROLL CHANGES

INCENTIVE PAY

Payroll changes are especially relevant as they relate to issuing incentive pay (non-discretionary bonuses, commissions or any other non-hourly pay) to non-exempt employees. Per FLSA requirements, overtime must be calculated weekly based on the employee's "regular rate of pay". However, incentive pay must be included in the employee's "regular rate of pay" calculation.

For weeks in which a non-exempt employee earns both overtime and incentive pay – whether provided at the time or retroactively – the company must calculate (or recalculate) the employee's regular rate of pay so that it includes both

their base pay and incentive pay for the week, then utilize the new amount for overtime calculations.

Please see the FAQs at the end for an example calculation.

WORKWEEK

While not a change, it's important that the individual responsible for payroll, along with managers and employees, are well-aware of the company's 7-day workweek. Every company must have an established workweek that is not adjusted or altered to avoid overtime. Each workweek is assessed individually for overtime calculations, and overtime must be paid for each workweek in which it is earned.

COMP TIME

Arrangements where an employee receives amounts of time off (also known as compensatory or "comp time") in place of overtime wages **are not permitted** for non-exempt employees of private employers.



STEP 02

INTERNAL COMMUNICATION

Since the new overtime rules may mean some significant changes for your employees, it's important that all new or updated policies are communicated clearly. Here are some things to consider:

WHO WILL COMMUNICATE THE CHANGES?

Think about the size and structure of your organization, and who is most capable of getting the message to employees in an efficient and positive manner. Consider managers, the executive team, and your HR professional.

WHO DO YOU NEED TO NOTIFY?

Decide if you will only discuss changes with newly non-exempt employees or if a company-wide notification makes most sense. If numerous work schedules will need to be rearranged, if employees who used to answer multiple internal questions on weekends will no longer be able to, or if the lunch room is going to be much busier, then consider extending your notification to all employees.

WHAT SHOULD BE COMMUNICATED?

- » A high-level overview of the FLSA changes
- » The decision-making process for FLSA classification
- » New classification as non-exempt
- » Changes to compensation structure beyond classification as non-exempt
- » Company policies and procedures for non-exempt employees

SAMPLE RECLASSIFICATION LETTER

Use the sample letter at the end of this booklet as a starting point to communicate the FLSA changes to your employees.



STEP 02

INTERNAL COMMUNICATION

WHAT ABOUT THE TIMING?

Some states have requirements for advance notice of any changes to pay. Others require issuing written notice of the change. For those states that don't have requirements, we recommend at least one pay period advanced notice of any changes to pay, but for a change in classification, two or more pay periods' advanced notice is best.

WHAT SHOULD BE DOCUMENTED?

Absent state documentation requirements, we recommend clearly documenting these changes for the employee's personnel file.

All details for the classification change should be documented, including:

- » New FLSA classification as non-exempt
- » Type of pay received (e.g., hourly, salary, piece rate)
- » The effective date of the change

This document should be signed by the employee, their manager, and the human resources representative, and then stored in the employee's personnel file. Updated policies should be distributed and acknowledged by each employee, and the acknowledgment form should be maintained in their personnel file.

STEP 03

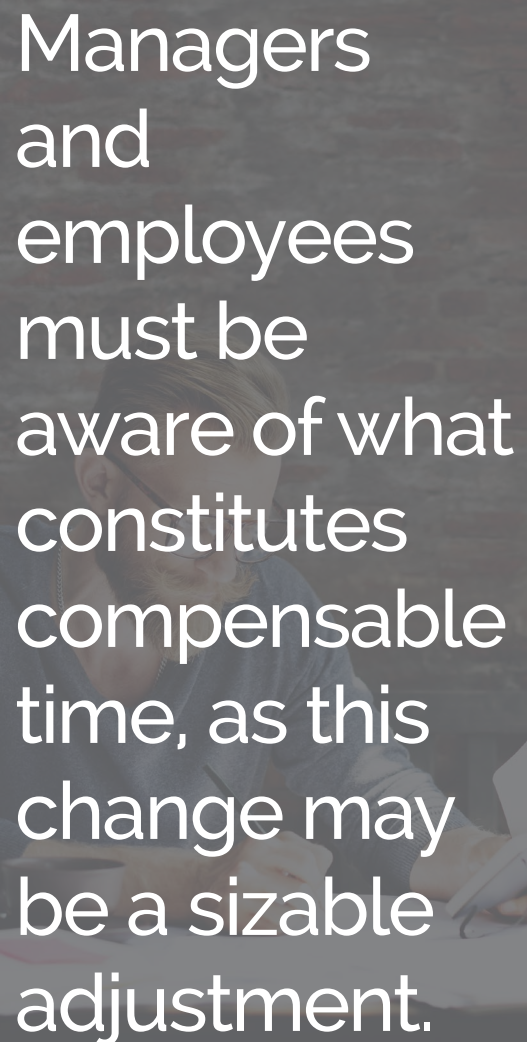
CONDUCT TRAINING

Set aside time to train your supervisors and managers to ensure that new and updated company policies and practices are accurately communicated, understood, followed, and enforced.

Additionally, managers and supervisors must understand the company's overtime practices and the budget implications of reclassifying employees. For example, if overtime should be avoided entirely, managers may need to adjust their scheduling to accommodate for this.

Managers also may need to examine their staffing models to ensure adequate staffing for service or product output.

Employees must be trained so that they are aware of each policy and how it affects them and their work each day. They must also understand that once they are trained and acknowledge the policies, failure to comply can result in discipline.

A woman with blonde hair and glasses is sitting at a desk, writing in a notebook. She is wearing a blue shirt. The background is slightly blurred, showing a desk with some papers and a pen.

Managers
and
employees
must be
aware of what
constitutes
compensable
time, as this
change may
be a sizable
adjustment.

STEP 03

CONDUCT TRAINING

Both managers and employees must be aware of what constitutes compensable time, as this change may be a sizable adjustment.

For example, travel time and time spent checking emails at night must be compensated. Employees will need to know how to report this time and managers will need to know how to schedule accordingly.

When training employees on the relevant policies and practices, it may be worth a few minutes of your

time to discuss that the driving force behind these changes is the FLSA, not your opinion of the reclassified employees.

For better or worse, being exempt (or salaried) has been a status symbol in the American workplace. It's important to communicate that this change isn't due to the employee's performance, dedication to the company, or contribution – it's simply a result of changes to federal law that the company must comply with.

For better or worse, being exempt (or salaried) has been a status symbol in the American workplace.

THE BENEFITS OF PROACTIVE TRAINING

Time, energy, and money dedicated to training will be well-spent. Proactive training on compliance – prior to the rule's effective date and in the following six months to a year – will cost a small fraction of the price of defending wage and hour claims.



STEP 04

REVISING COMPANY BUDGETS AND PROCESSES

Since the final rules have been issued, you should be able to analyze company budgets to determine the impact (assuming you've done the legwork to determine how many hours your currently exempt employees are working*).

Depending on the scale of the changes your organization needs to make, continuous monitoring of budgets may be necessary for the first six months to a year.

You may also want to consider planning ahead and assessing future budgets. Keep in mind that

part of the DOL's rule change is a mandatory increase to the minimum salary threshold every 3 years. The next increase, effective Jan. 1, 2020, is currently estimated to be just over \$51,000.

This means that every 3 years employers will need to go through the same process of identifying exempt employees that don't meet the pay criteria, assessing pay options, and reclassifying if needed.

***NEED HELP ON FIGURING OUT HOURLY WAGES FOR YOUR CURRENT EXEMPT EMPLOYEES?**

Visit or subscribe to the HR Support Center to check out our FLSA Overtime Changes Planning Booklet for detailed information and tools, including how to calculate rate of hourly pay for your employees who are currently exempt.



FACT SHEET

FLSA OVERTIME CHANGES AT A GLANCE

The new overtime rules will go into effect on December 1, 2016. Among other things, the rules double the salary level used to determine whether employees can be properly classified as exempt from overtime under the Fair Labor Standards Act. Here's an overview of the key changes employers should be aware of.

\$23,660/yr

CURRENT MINIMUM EXEMPT SALARY

\$47,476/yr

NEW MINIMUM EXEMPT SALARY



DECEMBER						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31



4.2 million

ESTIMATED WORKERS
AFFECTED

Dec. 1, 2016

EFFECTIVE
DATE

Increases

AUTOMATICALLY
EVERY 3 YEARS

ADDITIONAL RESOURCES

SAMPLE FLSA EMPLOYEE RECLASSIFICATION LETTER

[Date]
[Name]
[Street Address]
[City, State ZIP]

Dear [Employee Name],

This letter is to inform you that your position has been reclassified as non-exempt. This change will be effective [enter date], at which time you will be paid [per hour, salary non-exempt, per piece rate]. Details on the reason for this change along with steps for the future are provided below, but please feel free to visit with your manager or [HR representative's name] with any questions. We are here to answer questions and will provide as much information as possible.

We'd like to provide you with some background on changes to the law that have affected your employee classification. The federal Fair Labor Standards Act (FLSA) and state laws govern position classifications as exempt or non-exempt from minimum wage and overtime, and these laws apply to all positions. Positions that are exempt from overtime must meet very specific criteria, such as paying a minimum salary amount, paying on a salary basis, and passing a specific job duties test. Positions that do not meet these criteria are called non-exempt, and the laws require that non-exempt positions are paid minimum wage and overtime.

Prior to recent federal law changes, employees who were classified as exempt had to make at least \$455 per week [\$800 per week in California; \$675 per week in New York]. However, on May 18, the Department of Labor announced that the new minimum salary threshold will be \$913 per week, or \$47,476 per year. This rule takes effect on December 1, 2016.

[Company] has reviewed your position with these legal rule changes in mind and has elected to reclassify the position as non-exempt.

As a non-exempt employee, you will be asked to track and record all hours worked, and you will receive overtime if you work more than 40 hours in a workweek. For your reference, our company workweek begins at 12:00 am on [day, e.g. Sunday] and ends at midnight on the following [day, e.g. Saturday].

ADDITIONAL RESOURCES

SAMPLE FLSA EMPLOYEE RECLASSIFICATION LETTER (CON'T.)

There are several company policies and practices that are important to be aware of with regards to your new classification, and we will hold a company training on [date] at [time]. [Alternative: There are several company policies and practices that are important to be aware of with regards to your new classification.

Your manager/supervisor will share these with you, and [HR representative's name] is available to answer any questions. Alternative: There are several company policies and practices that are important to be aware of with regards to your new classification; they are attached to this letter, along with an acknowledgement form. Your manager will set aside time for you to review these policies and ask questions.]

You play a key role with [Company] and we assure you that this is not a demotion and has nothing to do with your value to [Company]. We value your contribution and hard work for our team! This change is being driven by the updated FLSA rules and has nothing to do with your performance or contributions to the company. Your job title and job duties will not change.

[Optional, and suggested if true: Steps have been taken to ensure that this change to non-exempt does not result in a decrease in your compensation. In fact, if you work 40 hours per week, your compensation should remain the same. Additionally, because you are now eligible for overtime, your compensation may actually increase if you work more than 40 hours. However, please note that all company overtime must be approved ahead of time by a manager or supervisor.]

If you have questions concerning this action or need further clarification about your classification, please reach out to me or your manager.

Sincerely,

[Signature]
[Name and Position Title]

ADDITIONAL RESOURCES

TIME TRACKING MEMO TO EMPLOYEES

This correspondence is intended to notify you that we will be tracking employee time for the next [two months, six weeks, 30-days], beginning on [date to start tracking]. This tracking is necessitated by the recent rule changes to what are commonly known as the White Collar Exemptions under the Fair Labor Standards Act (FLSA). The new rule states that for an employee to be exempt from overtime, they must make at least \$47,476 per year. Previously, the threshold to be classified as exempt was \$23,660.

We must comply by reclassifying or changing the pay structure of affected employees by December 1st, 2016. In order to assist with our decision-making process, we have decided to track employee time; this will help us determine what impact, if any, paying additional overtime will have on our budget. This information will not be used to make any improper deductions, and exempt employees will continue to be paid on a salary basis, under the same pay structure, until further notice. Changes to employee classifications or pay structures will likely take place during the last full pay period prior to the effective date of the new rules, although [company name] reserves the right to make changes before or after that time. Additional information will be provided to those affected prior to the change.

Please [describe timekeeping system, who (if anyone) time should be turned in to, when it should be turned in, and any additional guidance]. If there are any unique situations during this period that cause you to work many more or many fewer hours than you would over the course of a typical [two-month, six-week, 30-day] period, please alert your manager or supervisor so those entries can be taken into account.

We appreciate your involvement in accurately tracking all time worked during this period. Please do not hesitate to reach out to your manager or supervisor if you have any questions.

ADDITIONAL RESOURCES

FREQUENTLY ASKED QUESTIONS

What are the new minimum levels, and when will they go up next?

As of December 1, 2016, exempt executive, administrative, and (most) professional employees need to be paid **at least \$47,476 per year or \$913 per week**.

As of December 1, employees who are exempt under the Highly Compensated Employee (HCE)* exemption will need to be paid **at least \$134,004 per year**.

The next increase will be on January 1, 2020. Current projections estimate that the minimum for executive, administrative, and some professional employees will increase to \$51,168, and the minimum for employees who are exempt under the HCE exemption will increase to \$147,524.

*The HCE exemption may be used when an employee performs just one or more duties of an executive, administrative, or professional employee. They do not, however, have to meet all elements of any given duties test.

When should I change an employee's status to non-exempt?

We recommend notifying employees of their classification change at least 30 days before their pay is impacted, and we recommend an effective date for the change no later than the start of the pay period that includes December 1, 2016. This will prevent a mid-pay period classification change. Issuing pay to an employee for one pay period that includes classification as both exempt and non-exempt is complicated, and your payroll specialist will thank you for using a pay period start date for ease of transition.

ADDITIONAL RESOURCES

FREQUENTLY ASKED QUESTIONS

Is issuing commissions, non-discretionary bonuses, or other pay to non-exempt employees different?

Yes, and it's definitely more complicated than it is for exempt employees.

The FLSA requires that overtime is calculated weekly based on the employee's "regular rate of pay". However, although they may not seem "regular", commissions, non-discretionary bonuses and other non-hourly pay must be included in the "regular rate of pay" calculation. For weeks in which a non-exempt employee earns both overtime and incentive pay – whether provided at the time or retroactively – the company must calculate (or recalculate) the employee's regular rate of pay so that it includes both their base pay and incentive pay for the week, then use the new amount for overtime calculations.



ADDITIONAL RESOURCES

Here's an example of this calculation, courtesy of the Department of Labor:

An employee paid biweekly at a rate of \$12 per hour plus a \$100 attendance bonus, working a schedule of 56 hours per week as shown in the chart below, would be due overtime pay as follows:

	Sun	Mon	Tue	Wed	Thu	Fri	Sat
Week 1 Hours worked	8	8	8	8	8	8	8
Week 2 Hours worked	8	8	8	8	8	8	8

\$100 (bi-weekly attendance bonus) ÷ 2	= \$50 (weekly bonus equivalent)
56 hours worked x \$12/hour + \$50 (weekly bonus equivalent)	= \$722 (total ST compensation)
\$722 (total ST compensation) ÷ 56 hours worked	= \$12.89 (regular rate)
\$12.89 (regular rate) x ½	= \$6.45 (half-time premium)
\$12.89 (regular rate) + \$6.45 (half-time premium)	= \$19.34 (overtime rate)
40 (straight time hours) x \$12.89 (regular rate)	= \$515.60 (straight time earnings)
16 (overtime hours) x \$19.34 (overtime rate)	= \$309.44 (overtime earnings)
Total earnings for week one	\$825.04
Total earnings for week two	\$825.04
Total earnings for bi-weekly period	\$1,650.08

ADDITIONAL RESOURCES

FREQUENTLY ASKED QUESTIONS

What's the difference between a non-discretionary and discretionary bonus?

Essentially, non-discretionary bonuses are goal-based and guaranteed if goals are met. Discretionary bonuses are at the employer's whim and should not be expected.

The FLSA defines non-discretionary bonuses as those that are announced to employees to encourage them to work more steadily, rapidly or efficiently, and bonuses designed to encourage employees to remain with an organization. If there is an established set criteria an employee has to meet, and the bonus is guaranteed to be earned once those criteria are met, that will be considered a non-discretionary bonus. All non-discretionary bonuses must be included in the regular rate of pay, as outlined above, and will impact the overtime rate when they are issued in the same workweek in which overtime is earned.

Not many bonuses qualify as discretionary under the FLSA, although those that do qualify can be excluded from the regular rate of pay and overtime calculations. A discretionary bonus provided to an employee is just that: something an employer is not obligated to provide and can give to any employee for any reason or no reason at all. Generally they're given out of appreciation, loyalty, or good service. Employees do not expect them.

Will non-discretionary bonuses and commission count towards the minimum salary threshold?

Up to 10% of the minimum salary threshold – \$4,747 – may come from non-discretionary bonuses, commissions, or other incentive pay. These payments must be made on at least a quarterly basis, and if the employee does not earn enough of this incentive pay to reach the exempt salary threshold, the employer must pay the difference in order to keep the employee's exemption intact; the DOL is calling these "catch-up payments". Note that those exempt under the Outside Sales Employee exemption (which is narrow) are not subject to the minimum salary requirement.

ADDITIONAL RESOURCES

FREQUENTLY ASKED QUESTIONS

Can I classify an employee as salaried non-exempt?

Yes. However, this hybrid salaried/non-exempt pay classification can present challenges.

The idea behind paying employees this way is that for weeks where they work 40 hours or fewer, you can essentially hit the “regular weekly pay” button and be done with it. Unfortunately, this can make both the employer and employees lackadaisical about timekeeping. But this pay classification still requires strict timekeeping, just as for all non-exempt employees, in order to determine overtime eligibility. This includes timekeeping entries for when work begins and ends as well as compliance with the state's meal and/or rest period requirements, if applicable. If hours are not tracked properly and there is a dispute, the burden of proof will be on the employer to substantiate that pay was accurate for hours worked, and this will likely be very challenging.

Can part-time exempt employees remain part-time?

Yes, but they will still have to make \$913 per week, every week.

Regardless of whether an employee is full or part-time, they must meet each of the criteria for an exempt classification under the FLSA. Therefore, so long as the pay meets the minimum salary threshold, they are paid on a salary basis, and they meet the duties test, they may be classified as exempt. Failure to meet the minimum salary amount, or any of the other criteria for an exempt classification, will result in a non-exempt classification determination.

Does this change even apply to me?

Almost certainly. There are two ways in which employees can be covered by the FLSA. The first is called “enterprise coverage”. This applies when an employee works for an employer who has an annual dollar volume of cash sales or business done of \$500,000 or more. It also applies if the employer is a hospital, business providing medical or nursing care for residents, school or preschool, or government agency.

The second type of coverage is called “individual coverage”. Even when there is no enterprise coverage, the FLSA will cover individuals engaged in interstate commerce. If an employee makes goods that will be shipped out of state, places telephone calls to another state, sends or receives out-of-state shipments, or partakes in any number of other basic business activities, they will qualify for individual coverage.



MORE FLSA RESOURCES

Visit or subscribe to the HR Support Center for more information on the overtime changes. There you'll find:

- » FLSA Overtime Changes Fact Sheet
- » 2 Minute HR Training
- » Employee Memo
- » Classification Change Letter
- » Overtime Calculation Guide



COMMONWEALTH
PAYROLL & HR



commpayhr.com | info@commpayhr.com | (877) 245-1159

Legal Disclaimer: This document is intended for informational purposes only, and does not constitute legal information or advice. This information and all HR Support Center materials are provided in consultation with federal and state statutes and do not encompass other regulations that may exist, such as local ordinances. Transmission of documents or information through the HR Support Center does not create an attorney-client relationship. If you are seeking legal advice, you are encouraged to consult an attorney.